

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
Implementation of Section 207 of the)	
Satellite Home Viewer Extension and)	MB Docket No. 05-89
Reauthorization Act of 2004)	
)	
Reciprocal Bargaining Obligations)	
)	

REPLY COMMENTS OF ECHOSTAR SATELLITE L.L.C.

EchoStar Satellite L.L.C. (“EchoStar”) hereby submits its reply to comments received in the above-referenced proceeding.¹ Specifically, EchoStar responds to arguments by broadcasters that the good faith negotiation requirement in Section 325(b)(3)(C) of the Communications Act of 1934² does not apply to negotiations for carriage of a broadcast station outside of its designated market area (“DMA”). The broadcasters’ arguments are without basis in the statutory language and, moreover, are based on flawed distinctions between negotiations for in-market and out-of-market carriage.

In addition, EchoStar urges the Commission to rule that a refusal to grant retransmission consent for out-of-market carriage when a broadcaster is under a contractual obligation to decline consent violates the good faith requirement. Such contractual restrictions are inconsistent with the cable and satellite compulsory copyright license provisions and frustrate

¹ See *Implementation of Section 207 of the Satellite Home Viewer Extension and Reauthorization Act of 2004; Reciprocal Bargaining Obligations*, FCC 05-49, Notice of Proposed Rulemaking, MB Docket No. 05-89 (rel. Mar. 7, 2005) (“NPRM”).

² 47 U.S.C. § 325(b)(3)(C) (as amended by Section 207 of Satellite Home Viewer Extension and Reauthorization Act of 2004 (“SHVERA”)).

Congress's intent to make stations available by satellite in communities in which they are significantly viewed.

I. THERE IS NO BASIS IN THE STATUTORY LANGUAGE FOR EXEMPTING RETRANSMISSION CONSENT NEGOTIATIONS FOR OUT-OF-MARKET CARRIAGE FROM THE GOOD FAITH REQUIREMENT

Both the National Association of Broadcasters ("NAB") and the ABC, CBS, FBC and NBC Television Affiliate Associations ("Network Affiliates") contend that the requirement to negotiate in good faith in Section 325(b)(3)(C) of the Communications Act and related Commission rules do not apply when a broadcaster and a multichannel video programming distributor ("MVPD") are negotiating for carriage of a broadcast station outside of the station's DMA.³

However, there is no basis in the statutory language to draw a distinction between out-of-market and in-market retransmission consent negotiations and neither NAB nor the Network Affiliates point to any such basis. As EchoStar has previously submitted,⁴ in the absence of specific limiting language, the good faith standards established by the Commission under Section 325(b)(3)(C) apply in all cases where retransmission consent is required. There is simply nothing in Section 325(b)(3)(C) or the Commission's rules to indicate that the good faith standards are to be limited to some retransmission consent situations and not others.⁵ When the

³ Comments of the National Association of Broadcasters at 2-3, *filed in* MB Docket No. 05-89 (filed Apr. 25, 2005) ("NAB Comments"); Comments of the ABC, CBS, FBC, and NBC Television Affiliate Associations at 3-5, MB Docket No. 05-89 (filed Apr. 25, 2005) ("Network Affiliates Comments").

⁴ Comments of EchoStar Satellite L.L.C. at 3, *filed in* MB Docket No. 05-89 (filed Apr. 25, 2005) ("EchoStar Comments").

⁵ See *Monroe, Georgia Water Light and Gas Commission v. Morris Network, Inc.*, DA 04-2297, Memorandum Opinion and Order, 19 FCC Rcd 13977, at ¶ 9 n.24 (Media Bur. 2004) ("*Monroe*") ("The [good faith] statute appears to apply equally to stations and MVPDs in the same local market or in different local markets.").

intent of Congress is clear from the language of the statute, that is the end of the matter and no other construction of the statute is permissible.⁶

II. THERE IS NO RELEVANT DISTINCTION BETWEEN RETRANSMISSION CONSENT NEGOTIATIONS FOR IN-MARKET AND OUT-OF-MARKET CARRIAGE OF BROADCAST STATIONS

Despite the lack of textual support, the NAB and the Network Affiliates press their argument by relying on a flawed distinction between in-market and out-of-market retransmission consent negotiations -- the fact that “[b]roadcast stations have no carriage rights outside their DMA”⁷ -- in an effort to limit the express words of the statute.

This is no distinction at all. Retransmission consent negotiations always take place when the broadcast station has no right to demand mandatory carriage. Even in the case of in-market carriage of local stations, retransmission consent negotiations only take place *after* the broadcaster has forgone its must-carry rights and elected retransmission consent. It follows that good faith bargaining is equally important, whether broadcasters and MVPDs are negotiating for in-market or out-of-market retransmission consent.

Both NAB and the Network Affiliates also stress the importance of broadcasters being able to “withhold” retransmission consent as a reason for not extending the good faith requirement to out-of-market retransmission consent negotiations.⁸ This makes no sense. A good faith obligation on out-of-market market retransmission consent negotiations would not require any party to reach agreement on carriage. The broadcaster will still be able to “withhold” retransmission consent and the MVPD will still be able to refuse carriage -- they need only

⁶ *Chevron U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 842-43 (1984) (“If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”).

⁷ NAB Comments at 3. *See also* Network Affiliates Comments at 4.

⁸ NAB Comments at 3 and Network Affiliates Comments at 4.

negotiate in good faith. Accordingly, the need to preserve broadcasters' ability to "withhold" retransmission consent is not a reason to limit the good faith bargaining requirement to in-market retransmission consent negotiations.

III. A REFUSAL TO NEGOTIATE IN THE PRESENCE OF A CONTRACTUAL RESTRICTION ON THE GRANT OF RETRANSMISSION CONSENT FOR OUT-OF-MARKET CARRIAGE VIOLATES THE GOOD FAITH BARGAINING REQUIREMENT

NBC Telemundo License Inc. ("NBC Telemundo") argues that the good faith obligation does not require a broadcast station to negotiate retransmission consent outside the geographic area in which the station has the contractual right to agree to redistribute programming.⁹ NBC Telemundo asserts that "any good-faith requirement should not be read to override the private property rights of networks, syndicators or other program providers,"¹⁰ on the basis that such program providers must be able to retain "control over the out-of-market or national redistribution of [their] programming . . ."¹¹ This is necessary, NBC Telemundo suggests, to preserve program providers' ability to enter into exclusive programming arrangements.¹²

This argument is flawed because of its faulty premise -- namely that copyright holders' "property rights" include the unfettered right to control further redistribution of broadcast programming. This is simply not so. Congress limited copyright holders' absolute control over redistribution of broadcast programming when it created the cable and satellite

⁹ Comments of NBC Telemundo License, Inc. at 2 *et seq.*, filed in MB Docket No. 05-89 (filed Apr. 25, 2005) ("NBC Telemundo Comments").

¹⁰ *Id.* at 3.

¹¹ *Id.* at 1.

¹² *Id.* at 3-5.

compulsory licenses for retransmission of broadcast signals.¹³ Provided that the cable operator or satellite carrier complies with the requirements of the statutory copyright license and pays the relevant royalty fees, Congress has already decided that broadcast programming can be retransmitted by such MVPDs without the need to obtain the copyright holders' consent.

While Congress and the Commission have made some provision for programming exclusivity through network nonduplication and syndicated exclusivity rules,¹⁴ these rules are the full extent to which such exclusivity rights are protected. Neither Congress nor the Commission intended to permit networks, syndicators and programmers to circumvent these well defined limits on program exclusivity through contractual restrictions on broadcasters' ability to grant retransmission consent for out-of-market carriage of their broadcast signals. Indeed, such contractual restrictions would thwart Congress's intent to make out-of-market stations available to MVPD subscribers through the cable and satellite compulsory licensing provisions of the Copyright Act. Equally important, the concern of NBC Telemundo is totally misplaced in the context of significantly viewed stations. By definition, such stations can already be viewed by residents in an adjacent market over-the-air, and this is why Congress decided that a satellite carrier may retransmit them without being subject to network nonduplication and syndicated exclusivity rules.¹⁵

¹³ See 17 U.S.C. §§ 111 and 119.

¹⁴ See 47 U.S.C. § 339(b); 47 C.F.R. §§ 76.92, 76.93, 76.101-110, 76.122-123.

¹⁵ See 47 U.S.C. § 340(e)(1) ("[Significantly viewed signals] are not subject to the Commission's regulations concerning network nonduplication or syndicated exclusivity unless, pursuant to regulations adopted by the Commission, the Commission determines to permit network nonduplication or syndicated exclusivity to apply within the appropriate zone of protection."). Consistent with Congressional intent, the Commission has proposed to create an exception for significantly viewed stations comparable to the exception found in the cable network nonduplication and syndicated exclusivity rules. See 47 C.F.R. §§ 76.92(f), 76.106(a); *Implementation of the Satellite Home Viewer Extension and Reauthorization Act of 2004*;

Thus, contractual restrictions of the kind supported by NBC Telemundo would thwart Congress's intent to make out-of-market broadcast stations available via satellite in communities where they are significantly viewed,¹⁶ subject only to the retransmission consent of the broadcast station and not the consent of any third party (whether a network, a syndicator, or a programmer).

Accordingly, the Commission should not only reject NBC Telemundo's interpretation of the good faith provision but should adopt EchoStar's submission that a broadcast station's refusal to negotiate retransmission consent in the presence of a contractual restriction should be a *per se* violation of the good faith requirement or, at least, presumptively inconsistent with competitive marketplace considerations.¹⁷

Implementation of Section 340 of the Communications Act, FCC 05-24, Notice of Proposed Rulemaking, MB Docket No. 05-49, at ¶ 26 (rel. Feb. 7, 2005).

¹⁶ See 47 U.S.C. § 340; 17 U.S.C. § 119(a)(3).

¹⁷ EchoStar Comments at 4. See also *Monroe*, at ¶ 9 n. 24 (“[W]e caution broadcasters to be aware of existing contractual obligations that affect a station’s ability to negotiate a retransmission consent agreement in good faith.”).

IV. CONCLUSION

For the foregoing reasons, the Commission should (1) reject the broadcasters' attempt to limit the scope of the good faith requirement to in-market retransmission negotiations, and (2) determine that a refusal to negotiate in the presence of a contractual restriction on the grant of retransmission consent for out-of-market carriage violates the good faith bargaining requirement.

Respectfully submitted,

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